National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

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TO: Rosemary Pye, Regional Director, Region 1

FROM: Robert E. Allen, Associate General Counsel, Division of Advice

536-2557, 536-5075-5098

This case was submitted for advice as to whether the Union violated Section 8(b)(1)(A) of the Act by: (1) requiring financial core membership dues under a union security agreement from an employee who was denied full membership in the Union; (2) offering financial incentives to Union members who attend meetings while denying such incentives to nonmember employees who are not permitted to attend such meetings; and (3) denying an employee's membership application for invidious reasons.

FACTS

Local 745, Graphic Communications International Union, AFL-CIO (Capital City Press, Inc.) Case 1-CB-8015 represents a bargaining unit of production and maintenance employees employed by Capital City Press, Inc. (the Employer). The current collective-bargaining agreement between the Union and the Employer contains a union security clause that requires new employees to become members of the union after 120 days of employment.

For a number of years, the Union has had an incentive program whereby it gives a $60 to members who attend five meetings in a year. It appears that approximately 15% of the Union's members receive the rebate. The Union has variously characterized this payment as a dues rebate and as incentive pay intended to encourage members to attend meetings. The $60 is not available to nonmembers, as they are not permitted to attend Union meetings under the Union's by-laws.

Bruce Watson (the Charging Party) has been employed as a pressman by the Employer since February 1992.[(1)] In July, Watson was appointed to a position working as a leadperson until at least January 1993.[(2)] Before he was rehired in February, Watson had previously worked for the Employer for approximately seven years, but had resigned to undertake another business. During his previous tenure with the Employer, Watson had been a member of the Union and had served as the Union's Secretary Treasurer, as its President, and as a member of the Executive Committee and the negotiating committee.

In July, Watson was approached by Jeffrey Staub, then the Union's Secretary Treasurer, who asked Watson if he wanted to join the Union. Watson then filled out a membership application and a dues check-off authorization. On or about August 22, after Watson's 120 day grace period, he observed that full union dues were being deducted from his paycheck. Watson had, as yet, not been told the status of his membership application. In mid-September, he was approached by Kenneth Conley, a Union member, who told him that the Union had formed a membership committee at its September meeting,[(3)] and that Conley had been charged with investigating Watson's membership application. Under the Union's by-laws, an applicant for membership must be approved by the membership committee before he could be granted membership in the Union.

The membership committee was chaired by John Fraser, who appears to bear Watson considerable personal animosity.[(4)] Watson attributes this animus to Fraser's desire for the leadperson position to which Watson had been appointed. In addition, soon after Watson was appointed leadperson, someone defaced pictures of Watson's children. In his attempt to find out who had done, this, Watson asked Fraser if he had done it and said that several people had implicated him. Fraser demanded an apology and apparently was insulted by Watson's question.

On December 14, Union president John Beckles told Watson that his application for membership had been denied. Beckles did not give Watson a reason for the denial. In this December 14 conversation, Watson told Beckles that he expected to receive the $60 rebate available to Union members who attend Union meetings, since it was not his choice that he was not allowed to

attend Union meetings. Beckles replied that the rebate was available for Union members only, but that the Union would refund the difference between the full Union dues that had been deducted from Watson's pay and the lesser amount that the Union charged of financial core members under the union security agreement.(5)

The Region has obtained a copy of a memorandum sent by the membership committee to Union members which explains that the committee was reporting unfavorably on the applications of Watson and one other applicant.(6) The reasons given for Watson's denial include his "falsely accusing" Fraser and other members of defacing the pictures, his installation as a leadperson "long before ever applying to become a union man, which pretty much shows which direction he's going in," and "other concerns brought out by other members also." Fraser has since confirmed that this memorandum accurately reflects the reasons that the membership committee denied Watson's application.

On January 14, 1993, Watson filed the instant charge alleging that the Union violated Section 8(b)(5) of the Act by charging him a membership fee under the union security agreement that was discriminatory. The two-page charge recited at length all of the relevant facts of the Union's conduct. The Region has concluded that no violation of Section 8(b)(5) has been shown and that issue has not been submitted to the Division of Advice.

ACTION

We conclude that the Union violated Section 8(b)(1)(A) of the Act by: (1) requiring Watson to pay dues while denying him requested membership in the Union; (2) denying Watson the opportunity to earn the $60 dues rebate available to those members who attend all Union meetings; and (3) denying membership to Watson for invidious reasons.

The requirement that an excluded employee pay dues

Initially, we conclude that the Union violated Section 8(b)(1)(A) of the Act by requiring Watson to pay dues while denying him requested membership in the Union. The Board has repeatedly held that a union violates the Act by charging dues from employees while excluding them from membership.(7) And this principle applies where membership is denied for legitimate reasons (e.g., dual unionism) as well as where it is denied for illegitimate considerations (e.g., unit employees engaged in activity protected by the NLRA).(8) These decisions are consistent with the Supreme Court's decision in NLRB v. General Motors Corp.,(9) in which the Court upheld the validity of agency shop arrangements while making it clear that it was not addressing "the significance of desired, but unavailable, union membership . . ."(10) In so doing, the Court raised the argument that "Congress, it is said, had no desire to open the door to compulsory contracts which extract money but exclude the contributing employees from union membership."(11)

In the instant case, there is no dispute that the Union excluded Watson from membership and continued to have financial core membership dues deducted from Watson's pay. Moreover, by refusing to reduce Watson's dues payments by the $60 rebate as he requested, the Union was clearly requiring him to pay the full financial core membership dues at a time when he was excluded from the Union. Thus, consistent with Schweitzer Dipple, Inc., et al., we conclude that the Union violated Section 8 (b)(1)(A) of the Act by requiring Watson to pay dues while denying him requested membership in the Union.

This conclusion is not diminished by the Board's decision in Pipefitters Local 81 (Morrison Construction Co.).(12) The union in Morrison Construction Co. had a rule under which it would grant membership only upon a showing that the employee had: (1) four years experience or 1800 hours worked and an examination before the union's executive board; or (2) become an apprentice.(13) The Board found that the union did not violate the Act by compelling certain employees who did not qualify for membership to nonetheless pay dues under an agency shop provision. The Board's holding was based on the nondiscriminatory nature of the basis for the exclusion of the employees from membership and the fact that these employees "would be placed in a preferred position, if they were given free access to membership in [the union] without having to meet the criteria established for membership for all its other members."(14) This rationale is consistent with the language of Section 8(a)(3), which makes it an unfair labor practice for an employer to discriminate against an employee for nonmembership in a labor organization "if he has reason for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members." Thus, while in Morrison Construction Co., membership was available

to the excluded employees on the same terms and conditions generally applicable to other members,[(15)] the Union's denial of membership in the instant case was not based on some uniformly applicable, non-discriminatory rule reflecting a legitimate union concern. Moreover, Morrison has not been extended beyond its particular facts and as shown above it is well established that ordinarily a union cannot require the payment of union security dues by employees who have been denied membership.

The dues rebate available only to members

We further conclude that the Union violated section 8(b)(1)(A) of the Act by offering a dues rebate to members who attend Union meetings, while denying nonmembers the opportunity to earn the rebate. In Machinists District Lodge 720 (McDonnell Douglas Corp.),[(16)] the Board found that a union violated Section 8(b)(1)(A) of the Act by providing "unemployment stamps" that reduced dues liability to members who were unemployed, while refusing to provide them to similarly situated nonmembers who paid financial core dues under a union security agreement. The Board reasoned that this discriminated on the basis of union membership, restrained and coerced nonmembers to join the union to receive the benefit, and affected the nonmembers' tenure of employment by making it them pay more dues which was required for employment under the collective-bargaining agreement's union security clause because of their non-membership in the union.[(17)]

In the instant case, we conclude that the Union similarly violated the Act in its dues rebate policy. As with the unemployment stamps offered by the union in McDonnell Douglas Corp., the Union's offer of dues rebates to members who attended meetings discriminates on the basis of union membership and affects nonmembers' tenure of employment by making them pay higher dues then certain union members. While only 15 percent of the Union's members apparently qualify for the dues rebate, all members are eligible for the benefit, while no nonmembers are similarly eligible.

We recognize that the Board upheld the legality of a similar dues rebate incentive intended to attract members to meetings in Local No. 171, Association of Western Pulp and Paper Workers (Boise Cascade Corp.).[(18)] That case, however, only addressed the relative rights of those members who attended the meetings and those that did not. The Board in Boise Cascade Corp. was not presented with the issue of nonmembers' rights. Indeed, the Board based its holding, in part, on the fact that there was no disparity in the dues incentive program as "each member was accorded an equal opportunity to share in the reward offered for giving of his time . . ."[(19)] The instant case clearly presents contrary circumstances, as the Union's program discriminates between members and nonmembers by not according nonmembers the opportunity to earn the dues rebate. Therefore, we conclude that the Union violated section 8(b)(1)(A) of the Act by offering a dues rebate to members who attend Union meetings, while denying non-members the opportunity to earn the rebate.

The denial of membership

Finally, the Region should argue that the Union violated Section 8(b)(1)(A) of the Act by denying membership to Watson for invidious reasons. In Local 1104, Communications Workers of America, AFL-CIO (New York Telephone Co.),[(20)] the Board and court found a violation of Section 8(b)(1)(A) where a union denied membership to employees who crossed the union's picket line at a time when the employees were not members of the union. In so holding, the Board and court relied upon the Supreme Court's opinion in Scofield v. NLRB,[(21)] where the Court stated that "Section 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has embedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." Similarly, in Teamsters Union Local No. 287, IBT (Emery Air Freight/Airborne Express),[(22)] the Board applied Scofield analysis in finding that a union violated Section 8(b)(1)(A) by involuntarily withdrawing employee's membership "because of the hostility generated by the [employee's] internal union politics." Thus, the Board and Second Circuit Court of Appeals have made clear the appropriateness of applying Scofield analysis to a Union's denial of, or expulsion from, membership.

In the instant case, we conclude that the Union has shown no "legitimate union interest" in its denial of Watson's membership. The Union has undeniably not based its denial of Watson's request for membership on some uniformly applicable, non-discriminatory basis, but instead, it appears to have acted based solely on Fraser's hostility and personal animosity toward Watson. The Board has stated that factors such as hostility and personal animus constitute "proscribed reasons,"[(23)] and such motivation does not meet the Union's responsibility of "complete good faith and honesty of purpose in the exercise of its

discretion,"[(24)] and its "statutory obligation to serve the interests of all [bargaining unit] members without hostility or discrimination toward any."[(25)] Thus, the invidious basis for the Union's action in denying Watson's application for membership does not further any legitimate interest of the Union and fails to meet the standard set forth in Scofield. We therefore conclude that the Union violated Section 8(b)(1)(A) by denying Watson's request for membership.

A different conclusion in this regard is not required by the proviso to Section 8(b)(1)(A), which states "That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . ." Although this proviso has been interpreted as giving broad protection to unions in their decisions regarding admission and expulsion,[(26)] it clearly is not absolute as shown by New York Telephone Co. and Emery Air Freight/Airborne Express. On the one hand, unit employees under Section 7 of the Act have the right, inter alia, to join a labor organization and to impose upon their employer the obligation to set their terms of employment through bargaining with their union. It seems obvious that having exercised these rights all unit employees have a protected vital interest in taking part in the process stemming from, and a part of, those rights (e.g., casting a vote for ratification/rejection of a contract which will govern practically all aspects of their employment and electing the union officials who will negotiate the contract and represent them in grievances).[(27)] Membership in the union is necessary in order for unit employees to exercise these fruits of their earlier Section 7 activity.

On the other hand, the proviso to Section 8(b)(1)(A) is a general grant of authority to unions with respect to controlling the acquisition and retention of membership.

These two statutory interest at times are in competition and, as such, must be balanced. And, as shown above, this balance has been struck by the application of the Scofield standard. As we have concluded that the Union's conduct fails to meet that standard, the Union's action is therefore not privileged by the proviso to Section 8(b)(1)(A). Thus, the Region should argue that the Union violated Section 8(b)(1)(A) of the Act by denying membership to Watson for invidious reasons.

Accordingly, complaint should issue, absent settlement, alleging that the Union violated Section 8(b)(1)(A) of the Act by: (1) requiring Watson to pay dues while denying him requested membership in the Union; (2) denying Watson the opportunity to earn the $60 dues rebate available to those members who attend all Union meetings; and (3) denying membership to Watson for invidious reasons.[(28)]

R.E.A.

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[1]All dates hereinafter are in 1992, unless otherwise noted.

[2]The Union does not take the position that employment as leadperson made Watson a statutory supervisor under Section 2(11) of the Act, and it does not appear that Watson has ever been such a supervisor.

[3]Such a committee is provided for in the Union's by-laws, but it does not appear that the Union ever had a membership committee before Watson's application.

[4]There has been no allegation or evidence that Fraser's animus towards Watson is based upon any activity protected by Section 7, such as internal union politics. Cf., Teamsters Union Local No. 287, IBT (Emery Air Freight/Airborne Express), 304 NLRB 119, 122 (1991).

[5]This money has not yet been refunded and the Union apparently continues to deduct full Union dues pending the outcome of the instant case. Watson, however, states that he is not alleging this failure to refund the dues as an unfair labor practice.

[6]The other applicant denied admission to the Union, Gail Sayers, was later admitted to membership.

[7]See, e.g., Pipefitters Local No. 120 (Schweizer Dipple, Inc.), 260 NLRB 392, fn. 4, 396-397 (1982), enfd. in relevant part 719 F.2d 178 (6th Cir. 1983) (union violated Section 8(b)(1)(A) by charging dues and fees at times employees were not members of the union); Laborers Local 573 (F.F. Mengel Construction Co.), 196 NLRB 440, 443 (1972), enfd. 83 LRRM 2988 (7th Cir. 1973) (where a union "refused to accept the employees here involved into membership, it could not require them to pay dues . . ."); NLRB v. CWA Local 1104 (New York Telephone Co.), 520 F.2d 411, 89 LRRM 3028, 3033, fn. 8 (2d Cir. 1975), enf'g 211 NLRB 114 (1978) ("although a union, even under a union shop clause, cannot compel any greater degree of membership than financial core membership, it must nonetheless, even under an agency shop clause, grant full membership to those employees who desire it if it wants to retain the right to receive their dues").

[8]NLRB v. CWA Local 1104 (New York Telephone), supra.

[9]373 U.S. 734, 737, 744 fn. 12 (1963).

[10]Id. at 744 fn 12.

[11]Ibid.

[12]237 NLRB 207, 209-210 (1978)

[13]Id. at 209.

[14]Id. at 209-210.

[15]Id. at 209.

[16]243 NLRB 697, 700 (1979), enfd. 626 F.2d 119 (9th Cir. 1980).

[17]Ibid.

[18]165 NLRB 971 (1967).

[19]Id. at 972. Significantly, although the Board analogized the dues refund offered in Boise Cascade to "the service of refreshments, the award of prizes, or entertainment at meetings," ibid, the Board stated that they "did not think it significant that the payment is labeled a reward or a refund . . ." Id. at 972 fn. 10. Thus, regardless of whether the Union characterizes the rebate as merely a reward for attendance at meetings or a refund of dues, the dues rebate program discriminates against nonmembers, as they are not permitted the opportunity to earn the same benefits as members.

[20]211 NLRB 114 (1978), enfd. 520 F.2d 411 (2d Cir. 1975).

[21]394 U.S. 423, 430 (1969).

[22]Supra, 304 NLRB at 22.

[23]See, e.g., Operating Engineers, Local 139 (C.F. Kalupa, Inc.), 256 NLRB 535 (1981). See also, e.g., United Steelworkers of America, Local No. 15167 (Memphis Folding Stairs, Inc.), 258 NLRB 484, 488 (1981), enf. denied 692 F.2d 1052 (7th Cir. 1982) ("The union may not refuse to represent a bargaining unit employee because of personal hostility toward that employee") and cases cited therein.

[24]Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

[25]Vaca v. Sipes, 386 U.S. 171, 177 (1967).

[26]See, e.g., 2 Leg Hist. 1142, 1420 (LMRA 1947) (remarks of Sen. Taft); Pattern Makers League of North America v. NLRB, 473 U.S. 95, 109 fn. 22 (1985); NLRB v Boeing Co., 412 U.S. 67, 73-74 (1973); Scofield, supra, 394 U.S. 423 at 428-430; NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 184-187, 194-195 (1967); International Association of Machinists v. Gonzales, 356 U.S. 617, 620 (1958); Union Starch and Refining Co., 87 NLRB 779, 787 fn. 23 (1949), enfd. 186 F.2d 1008 (7th Cir. 1951) ("a union may deny membership to an employee upon any ground it wishes . . ."); Plumbers Local 669 (American Fire Protection), 268 NLRB 515, 519-520 (1984), enfd. in relevant part 778 F.2d 8 (D.C. Cir. 1985).

[27]Cf. NLRB v. City Disposal, 465 U.S. 822, 831, 832 (1984), where the Court opined that the invocation of a collective-bargaining agreement is an integral part of the earlier process of union organization.

[28]We note that the instant charge was filed alleging that the Union violated Section 8(b)(5) of the Act, rather than Section 8(b)(1)(A). The Region concluded that no violation of Section 8(b)(5) has been shown and the issue was not submitted to the Division of Advice. The charge did, however, recite at length all of the relevant facts of the Union's conduct. Thus, the instant charge is sufficient to support the allegations of the complaint authorized herein as it "explicitly set[s] forth the factual basis for the complaint." Bakery, Cracker, Pie Workers, Local 734, IBT (ITT Continental, River Grove), 238 NLRB 1354, 1357 (1978) (identification of section of the Act alleged to have been violated "arguably legal surplusage"). See generally, e.g., Nickles Bakery of Indiana, Inc., 296 NLRB 927 (1989); Redd-I, Inc., 290 NLRB 1115 (1988); NLRB v. Fant Milling Co., 360 U.S. 301 (1959).